United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-2643

To be argued by
SUSAN S. BELKIN

(41955)

United States Court of Appeals

FOR THE SECOND CIRCUIT

MATTIE G. DIXON, as Administratrix of the Estate of L.C. SHERMAN, JR.,

Plaintiff-Appellee,

—against—

80 PINE STREET CORPORATION, RUDIN MANAGEMENT CORP., RAISLER CORP., THE CONSOLIDATED EDISON COMPANY OF NEW YORK, ADSCO MANUFACTURING CORP., RUTHERFORD L. STINARD, EMERY ROTH, RICHARD ROTH & JULIAN ROTH, d/b/a EMERY ROTH & SONS,

Defendants-Appellees,

and

DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK and LOUIS BECK, (not an original party to this action),

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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FOR THE SECOND CIRCUIT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

This is an appeal from an order of the District Court for the Southern District of New York (KNAPP, *J.*), which denied the City's motion for an order of protection, pursuant to Rules 45 (b), 45 (c) and 26 (c) F.R.C.P., quashing a subpeona in a case in which the City of New York is not a party.*

* A motion to dismiss this appeal on the ground that the order of the District Court was not a final order under 28 U.S.C. §1291 was denied by this Court, without opinion, on January 14, 1975.

Question Presented

Did the District Court err in finding that there was no general privilege to withhold the data requested?

Facts

(1)

On May 3, 1972, an explosion occurred at 80 Pine Street, New York, New York, resulting in seven fatalities (22a).*

Shortly thereafter, Joseph Stein, then Commissioner of the New York City Department of Buildings**, directed that a Board of Inquiry be convened to inquire into the cause or causes of the accident for the purpose of formulating remedial legislation or regulations to prevent such occurrences in the future, and to determine if there was a violation of the Building Code and/or any of the Rules and Regulations governing holders of Department of Buildings licenses (22a). The Board of Inquiry requested the appearance of numerous persons connected in many diverse ways with the subject premises. Departmental personnel who had conducted inspections subsequent to the accident and expert witnesses also testified as to their opinions regarding the cause or causes of the accident.

(2)

This wrongful death action was commenced on or about February 8, 1974, in the District Court for the Southern District of New York (1a, 7a-8a). Although the City of New York is not at the present time a party to this action,

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* Unless otherwise indicated numbers in parentheses refer to pages in Appellants' Appendix.

** Mr. Jeremiah T. Walsh is the present Commissioner of the Department of Buildings.

Louis A. Beck, Legal Counsel to the Department of Buildings of the City of New York, was served with a subpoena returnable September 30, 1974, to produce for discovery (18a):

> "1. A full and complete copy of the report prepared by the Board of Inquiries of the City of New York relating to and dealing with the 80 Pine Street explosion occurring on May 3, 1972 at the aforesaid premises.
>
> 2. A list of any and all names and addresses of witnesses appearing and testifying before the aforesaid Board of Inquiries relating to the aforesaid explosion on May 3, 1972.
>
> 3. Any and all files, expansion joints and other apparatus and any other appurtenances which were examined by members of the Board of Inquiries or by experts at their request with a full and complete copy of their report."

On October 11, 1974, the City of New York moved for a protective order quashing the subpoena directed to Mr. Beck, on the grounds of (20) "privilege, unreasonableness, undue burden, and nonpossession of items sought for discovery and inspection . . ."* In an affirmation in support of the motion to quash the subpoena dated September 27, 1974, Mr. Beck stated (22a-23a):

> "It is the experience of deponent that in order to perform its function, often there must be assurances

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* The physical evidence, *i.e.*, "expansion joints and other apparatus and any other appurtenances which were examined by members of the Board of Inquiries or by experts at their request" (18a), is not in question in the present case, since that material was returned to the owner of the building after the Buildings Department finished its inquiry.

given to prospective witnesses that their testimony will be treated as confidential, in order to elicit information that might otherwise not be forthcoming, or as to which constitutional protection may be claimed by such witnesses. Since a major responsibility of the Board is to prevent similar occurrences in the future by reason of the knowledge demanded, it is submitted that the public interest requires that the testimony given at such a Board of Inquiries [sic] should be protected, and a plaintiff referred to other more customary means of seeking to establish his cause of action."

On October 10, 1974, Judge Knapp ruled that there was no general privilege to withhold the data requested and referred the matter to Magistrate Jacobs to hear and report (5a, 38a). Magistrate Jacobs in a report dated November 13, 1974, recommended that the City be directed to produce for inspection and copying by all parties to the action, including defendants, the transcripts of the testimony of all witnesses and related exhibits, the physical evidence, and the report of the Board of Inquiry except for its "conclusions and recommendations" (39a-41a). In addition, he recommended that the report of Professor Fischer (a metallurgist) be produced except for its conclusion (41a).

The City's motion to quash was denied by Judge Knapp in a memorandum and order dated November 14, 1974.

Opinion Below

In denying the City's motion to quash Judge Knapp stated (38a):

"The matter came before me on October 10, 1974, when I ruled that there was no general privilege to

withhold the data requested. Since the City had presented no facts indicating to what extent, if any, it would be "burdened" by production of the matter subpoenaed, my ruling on lack of privilege would in ordinary course have ended the matter. However, attorneys for both parties to the motion (plaintiff and the City) indicated a disposition to accommodate each other, and were agreeable to my suggestion that the matter be referred to a Magistrate. I accordingly referred the motion to Magistrate Jacobs, who has now submitted the annexed report. I find Magistrate Jacobs' report to be eminently fair, approve its recommendations and direct the parties to arrange prompt compliance therewith."

With respect to the question of a general privilege, Judge Knapp stated in a footnote to his opinion (*Id.*):

"This question is controlled by *Cirale* v. *80 Pine Street Corp.* (1974), 35 N.Y. 2d 113, 359 N.Y.S. 2d 1. In that case, the Court of Appeals held that plaintiff had not shown "adequate special circumstances", as required by CPLR 3101 (a)(4), in order to be entitled to the discovery sought. In so holding, the court indicated that based on the record before it, the City had not established its claim of privilege as to this information. The City concedes that the record before me contains nothing that was not presented to the state courts."

ARGUMENT

The material requested by the parties to this action is immune from disclosure under the New York common-law privilege of "official information" as defined in the recent New York Court of Appeals case of *Cirale* v. *80 Pine Street Corp.*, 35 N Y 2d 113 (1974).

(1)

The federal courts in diversity cases, as a general proposition, follow the privilege rule announced by the statutes or decisions of the state in which they sit. See WEINSTEIN, *Recognition in the United States of the Privileges of Another Jurisdiction,* 56 Col. L. Rev. 535 (1956). This Court in *Massachusetts Mut. Life Ins. Co.* v. *Brei,* 311 F. 2d 463, 465-466 (2d Cir. 1962), stated that "there is considerable confusion in the decisions as to the application of the *Eire* case [*Eire R. Co.* v. *Tompkins,* 304 U.S. 64 (1938)] and the Federal Rules of Civil Procedure to state evidentiary privileges. However, the weight of authority appears to favor the view that the state rule is to govern. . . ." *Cf.* F.R.C.P. 26(b) and 43 (a). See also *Krizak* v. *W.C. Brooks & Sons, Inc.* 320 F. 2d 37, 43 (4th Cir. 1963). This rule applies with equal force to assertions of privilege at the discovery stage as well as the trial stage of litigation. *Application of Cepeda,* 233 F. Supp. 465 (S.D.N.Y. 1964); *Merlin* v. *Aetna Life Ins. Co.,* 180 F. Supp. 90 (S.D.N.Y. 1960).

On January 2, 1975, Congress passed the Federal Rules of Evidence, Public Law 93-595, which will become effective on July 1, 1975. The wording of the section on evidentiary

privilege, §501, is similar to F.R.C.P. 43 (a). It reads (U.S.L.W. January 14, 1975, Vol. 43, No. 27):

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

We believe that if this statute is applied to the present case, this privilege question would still be determined by state law.

(2)

In another case involving the 80 Pine Street explosion, and in which the same materials were subpoenaed as in the instant case, the New York Court of Appeals upheld the principle of a common-law privilege for "official information". *Cirale* v. *80 Pine Street Corp.*, 35 NY2d 113 (1974). The *Cirale* decision is reproduced on pp. 28a-36a of Appellants' Appendix. Judge Knapp acknowledged that the question of this privilege is controlled by *Cirale*. However, he stated that the New York Court of Appeals indicated that "based on the record before it, the City had not established its claim of privilege as to this information." (38a). We respectfully submit that Judge Knapp's

analysis of the opinion of the New York Court of Appeals in *Cirale* is incorrect and for this reason the case should be reversed and the motion to quash granted, or at the very least the case remanded for a new hearing.

The New York Court of Appeals in *Cirale* defined the common-law privilege of official information as "confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged." *Cirale, supra* at 117, citing *People* v. *Keating*, 286 App. Div. 150, 153 (1st Dept., 1955) and M. M. Caruso, *Governmental Non Disclosure in Judicial Proceedings*, 107 U. Pa. 166 (1959). The hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality." *Id.* at 117. (31a-32a). *Cf. Matter of Langert* v. *Tenney*, 5 AD 2d 286, 288 (1st Dept., 1958), app. dism. 5 NY2d 875 (1959). The New York Court of Appeals suggested that there be a balancing between the needs of the government and the private litigant. The Court said (*Cirale, supra* at 118) (33a):

> ". . . Thus, the balancing that is required goes to the determination of harm to the overall public interest. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure. While the need of a litigant for the information would present a strong argument for disclosure, the court should balance such need against the government's duty to inquire into and ascertain the facts of a serious accident for the purpose of taking steps to prevent similar occurrences in the future."

The New York Court of Appeals required that the governmental agency asserting the claim of governmental privilege must come forward and show that the public interest would indeed be jeopardized by a disclosure of the information. The Court indicated that in some cases an *in camera* examination by the Court might be proper. However, the Court indicated that in most cases such an *in camera* determination would not be necessary—"a description of the material sought, the purpose for which it was gathered and other similar considerations will usually provide a sufficient basis upon which the court may determine whether the assertion of governmental privilege was warranted." *Id.* at 119 (34a).

While it is true that in *Cirale* the Court of Appeals did not specifically hold that the material there subpoenaed was privileged, but rather merely left this question open for decision in the first instance by the lower courts in the event further disclosure proceedings were pursued, we believe that in light of the principles enunciated in *Cirale,* Mr. Beck's affidavit describing the nature of this investigation and the need for confidentiality constituted a sufficient showing to warrant a finding that this material was privileged. At the very least, we submit, it is clear here that Judge Knapp made no effort to apply *Cirale* to the facts of this case.

The rationale for the privilege against disclosure as the New York Court of Appeals stated in *Matter of Cherkis* v. *Impellitteri,* 307 N.Y. 132, 145-147 (1954), is that if the material (in that case the reports of the Commissioner of Investigation) were required to be made public they would tend to "become insignificant in content and the usefulness of the Commissioner's function will be likely to fail". "That, at the least", said the Court, "appears to be the theory on which the provisions of the charter

and the Administrative Code have been prepared. If the Commissioner is to be of value, his reports will tend to criticize the city administration rather than to praise it. It was evidently anticipated that such criticism would be constructive, in order that the Mayor might adopt helpful suggestions on the basis of detailed facts submitted to him regarding delicate and unsatisfactory situations." *Id.* at 147.

This rationale, advanced in dealing with an investigation by the New York City Commissioner of Investigation, fits equally the Commissioner of Buildings' inquiry. The Commissioner has the responsibility to ". . . require that the construction or alteration of any building or structure shall be in accordance with the provisions of law and the rules, regulations and orders applicable thereto; * * *." N.Y.C. Charter 1804 (4)(b). After the explosion at 80 Pine Street, the Commissioner of the Department of Buildings convened a Board of Inquiry "to inquire into and ascertain the facts, study the cause or causes of the accident, for the purposes of formulating remedial legislation or regulations intended to prevent said occurrences in the future, and determine if there was a violation of the Building Code and/or any of the Rules and Regulations governing holders of Department or Buildings licenses." (22a).

For a New York City Charter authorized investigation into the cause of the acident to be of value, the investigating officer and all those who communicate to him must not shrink from criticizing the Department's procedures and practices or those of any other party. Frequently, witnesses other than City employees are called to testify, and the necessity for candor and spontaneity on the part of these nondepartmental witnesses is apparent. This will be jeopardized if their testimony is not deemed confidential and is subject to scrutiny by prospective litigants.

The result would be a significant diminution of candor and spontaneity on the part of these witnesses and the utility of any future inquiries would be greatly impaired. In addition, it is the experience of the Department of Buildings that at Board of Inquiries there often must be assurances given to prospective witnesses that their testimony will be treated as confidential, in order to elicit information that might otherwise not be forthcoming, or as to which constitutional protection might be claimed by witnesses (23a). Quite clearly, if testimony before or communications to a Board of Inquiry or its report are required to be made public, such investigations will tend to become less critical of the City and other parties and "insignificant in content".

We submit that if Judge Knapp had properly applied the *Cirale* test to the present case he would have determined, based upon the description of the material sought and the purpose for which it was gathered, that the material requested in the subpoena addressed to Mr. Beck is privileged. At the very least, the District Court should have applied the *Cirale* balancing test in an *in camera* inspection of the material in question. Instead, Magistrate Jacobs merely cited some Federal Rules decisions in cases in which the United States was a party and in which federal law was applied (40a-41a). The cases cited by Magistrate Jacobs were not pertinent to the present case, since, as this is a diversity case the District Court should have applied New York rules of evidence. It is respectfully submitted that if New York evidentiary law is applied to the present case, the material requested should be deemed privileged under the New York common-law privilege of official information as defined in *Cirale* v. *80 Pine St. Corp.*, 35 N Y 2d 113 (1974).

CONCLUSION

The order appealed from should be reversed and the motion to quash the subpoena granted, with costs. In the alternative, the order appealed from should be reversed and the matter remanded to the District Court for consideration in light of *Cirale* v. *80 Pine St. Corp.*, 35 N Y 2d 113 (1974).

February 21, 1975.

Respectfully submitted,

W. Bernard Richland,
Corporation Counsel,
Attorney for Appellants.

L. Kevin Sheridan,
Susan S. Belkin,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

JAMES J. BOLAND

being duly sworn, says, that on the 21 day of Feb, 1975

at No. 100 Church st in the Borough of Manhattan in The City of New York, he served three copies

of the annexed Appellant's BRIEF upon HARRY H. LIPSIG Esq.,

the attorney for the PLAINTIFF-Appellee in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, this 21

day of Feb, 1975

James J. Boland

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Form 321-114 (120058(37)

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

James Burns

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of the annexed Appellant's Brief upon Hawes, Onorato & Hogarty Esq.,

the attorney for the Defendant Appellee Adsco Manufacturing Corporation in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, this 21

day of Feb 1975

Edward S Schubert

James Burns

EDWARD S. SCHUBERT
Notary Public, State of New York
No. 03-3606125
Qualified in Bronx County
Commission Expires March 30, 1975

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of the annexed Appellant's Brief upon Williams & O'Neill Esq.,

the attorney for the Consolidated Edison Company in the within entitled action by delivering

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leaving the same with him.

Sworn to before me, this 21

day of Feb 1975

Edward S Schubert

EDWARD S. SCHUBERT
Notary Public, State of New York
No. 03-3606125
Qualified in Bronx County
Commission Expires March 30, 1975

Form 321-1M-1120058(57)

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State of New York, County of New York, ss.: Chester Mitchell

being duly sworn, says, that on the 21 day of Feb, 19

at No. 444 Madison ave in the Borough of man in The City of New York, he served three copies

of the annexed Appellants Brief upon Quirk & Baklar Esq.,

the attorney for the Defendant-Appellee in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, this 21

day of Feb, 19 75

Edward S Schubert

EDWARD S. SCHUBERT
Notary Public, State of New York
No. 03-3636125
Qualified in Bronx County
Commission Expires March 30, 1975

Form 321-1M-112005(57)

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State of New York, County of New York, ss.: Chester Mitchell

being duly sworn, says, that on the 21 day of Feb, 19 75

at No. 10 East 40th St in the Borough of man in The City of New York, he served three copies

of the annexed Appellant Brief upon Hart & Hume Esq.,

the attorney for the Defendant Appellant. in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, this 21

day of Feb, 19 75

Edward S Schubert

EDWARD S. SCHUBERT
Notary Public, State of New York
No. 03-3636125
Qualified in Bronx County
Commission Expires March 30, 1975

Form 321-1M-112005(57)

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

JAMES J. BOLAND being duly sworn, says, that on the 21 day of February, 19 75 at No. 233 Bway in the Borough of Manhattan in The City of New York, he served three copies of the annexed Appellant's Brief upon Morris Duffy Ivoner & Jensen Esq., the attorney for the Defendant Appellee in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me this 21 day of Feb 19 75

Edward S Schubert

James J Boland

Form 321-1M-112005B(57)

EDWARD S. SCHUBERT
Notary Public, State of New York
No. 03-3536125
Qualified in Bronx County
Commission Expires March 30, 1975

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

James Burns

being duly sworn, says, that on the 21 day of Febraury, 19 75

at No. 10 Rockefeller Plz in the Borough of MAN in The City of New York, he served three copies of the annexed Appellant Brief upon Craig & Green Esq., the attorney for the Defendant appellant. in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

James Burns

Sworn to before me this 21 day of Febraury, 19 75

Edward S. Schubert

EDWARD S. SCHUBERT
Notary Public, State of New York
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Commission Expires March 30, 1975

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